

*a***MANCON BHD****v.****SAMUDRA MALAYSIA SDN BHD***b*

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NOOR AHMAD J
[CIVIL SUIT NO: S1-22-371-96]
17 APRIL 1998

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CIVIL PROCEDURE: *Action - Consolidation of actions - Discretion of court - Whether actions raising common questions of law and fact - Whether involving same parties or issues of law - Requirement for parties to be before the court*

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This was an application by the plaintiff to consolidate three other cases pending in other courts with the present action and for all the cases to be tried together. The facts were that in the present action, the plaintiff was the main contractor and the defendant was the owner and employer of a development project in Gombak ('the project'). In the three other cases, however, the respective plaintiffs therein were the sub-contractors appointed under the project, and the defendant in each case was the plaintiff in the present action as the main contractor. The facts further showed that the cause of action in the present action was for breach of contract whereby the plaintiff claimed, *inter alia*, for payment of certain sums of money alleged to be wrongfully retained by the defendant on account of liquidated and ascertained damages for delay and for repairs of defective works. The cause of action for the other three cases were also for breach of contract, but the respective claims were for work done under the sub-contracts. The issue that arose was whether, on the facts and in the circumstances, an order for consolidation ought to be ordered by the learned judge.

*e**f**g***Held:***h*

[1] The main purpose of consolidation is to save costs and time and therefore it will not usually be ordered unless there is some common question of law or fact bearing sufficient importance in proportion to the rest of the subject-matter of the actions to render it desirable that the whole should be disposed of at the same time.

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[2] In the instant case, although the disputes arose out of the main contract, the parties were different and so were the issues of law involved. The issue in the present action was whether the defendant had wrongfully retained the sums for liquidated and ascertained damages and for the costs of repairs of defective works against the sums due to the plaintiff under the

progressive payments as certified by the architect. On the other hand, in the three other cases, the main issue was whether the respective plaintiffs should be paid for work done in accordance with cl. 27(a)(vii) of the main contract. No order for consolidation, therefore, should be issued by the court. Alternatively, a consolidation order should not be made because the respective plaintiffs in the three other cases were not before the court to be heard.

[Application dismissed.]

Case(s) referred to:

Central Securities (Holdings) Bhd v. Haron Mohamed Zaid [1979] 2 MLJ 244 (**cit**)
Daws v. Daily Sketch [1960] 1 All ER 397 (**refd**)

Del E Webb International Hotel Co v. Hotel Merlin Penang Sdn Bhd [1973] 1 MLJ 31 (**not foll**)

Healey & Ors v. A. Waddington & Sons Ltd & Ors [1954] 1 CA 861 (**not foll**)

For the plaintiff - Joanna Loke Su Mei; M/s Soo Thien Ming & Nashrah

For the defendant - TE Cheah; M/s Suhaimi Khor Zulkifli & Chang

Reported by Ling Hea Hoon

JUDGMENT

Mohd Noor Ahmad J:

The plaintiff applied for three cases pending in other courts to be consolidated with the present action and to be tried together. I dismissed the application. Hence, this appeal.

The three cases are suit no. S4-22-344-95 and Suit no. S3-22-503-95 both filed in the Kuala Lumpur High Court and Summons No. 52-603-96 filed in Klang Sessions Court and to be transferred to Kuala Lumpur High Court.

In the present action the plaintiff is the main contractor and the defendant is the owner and employer in a development project on lots 10242 and 9337 Mk. Batu, Daerah Gombak, Selangor under the main contract (see exh. E in encl. (8)) and in those cases the respective plaintiffs are the sub-contractors appointed under the project and the defendant in each case is the main contractor (the plaintiff in the present action).

In the present action the cause of action is for breach of contract and the plaintiff claimed, *inter alia*, for payment of certain fixed sums of money allegedly to be wrongfully retained by the defendant on account of liquidated and ascertained damages for delay and of costs for repairs of defective works against the sum due to the progressive payments as certified by the architect. Whereas in those cases the causes of action are also for breach of contract

- a* and the respective plaintiffs variably claimed for work done under the sub-contracts. The defendants in those cases alleged in the defence that there was delay on the part of the said sub-contractors in the execution of the respective works and that the works were not executed in accordance with the sub-contracts which resulted in the owner and employer having retained the sums as claimed by the plaintiff in the present action, and counterclaimed against the sub-contractors.

c The basis of the application is that the disputes arose of the same transaction viz, the main contract wherein sub-contracts are subject to it by virtue of cl. 27 therefore, the determination of the issues will be on common questions of law and facts. And also the witnesses, parties and architect involved are more or less the same (see para. 13 of encl. (8)). The defendant opposed the application.

d It is trite that the main purpose of consolidation is to save costs and time, and therefore it will not usually be ordered unless there is "some common question of law or fact bearing sufficient importance in proportion to the rest" of the subject-matter of the actions "to render it desirable that the whole should be disposed of at the same time" (see *Central Securities (Holdings) Bhd v. Haron bin Mohamed Zaid* [1979] 2 MLJ 244 p 251 para. CDE left). Whether to make an order for consolidation is at the discretion of the judge, to be exercised when such a course appears necessary or advisable, and the exercise of any discretion must be a judicial one.

f To my mind, although the disputes arose out of the main contract the parties are different and so are the issues of law involved. In the present action the main issue is whether the defendant had wrongly retained the sums for liquidated and ascertained damages and for the costs of repairs to defective works against the sums due to the plaintiff under the progressive payments as certified by the architect; whereas in those cases the main issue is whether the respective plaintiffs should be paid for work done in accordance with cl. 27 (a) (vii) of the main contract.

g Even if I am wrong on this view a consolidation order should not be made because the respective plaintiffs in those cases were not before the court to be heard. Although they were served with the application there is no convincing proof before the court that they had been notified of the hearing date and/or told to attend the hearing if they so wished. In *Daws v. Daily Sketch* [1960] 1 All ER 397 it was held that before an order for consolidation was made, all the parties affected must first be heard.

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The cases cited by the learned counsel for the plaintiff are not followed because in *Del E. Webb International Hotel Co. v. Hotel Merlin Penang Sdn. Bhd* [1973] 1 MLJ 31 the actions were between the same plaintiffs and substantially the same defendants, though of different legal entities and in *Healey And Others v. A. Waddington & Sons Ltd., And Other* [1954] 1 CA 861 the facts and issues are not on all fours with the present cases before me where the actions were consolidated up to determination of the issue of liability only and in *Central Securities (Holdings) Bhd v. Haron bin Mohamed Zaid* [1979] 2 MLJ 244 consolidation was ordered because the plaintiffs were the same and the defendants were also the same.

Therefore, in the exercise of my discretion, the application is dismissed with costs.

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